17

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

NELLIE COPELAND, Admnx. of the Estate of JOHN W. HERTZ, Deceased,
Respondent.

No. 733

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Missouri
and
BRIEF IN SUPPORT THEREOF.

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INDEX.

Cases Cited.

Statutes Cited.

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered September 5, 1944, rehearing in which and motion to transfer to said Court en banc were denied October 9, 1944, by Division One of the court below, in this cause lately there pending, styled Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, respondent, vs. Terminal Railroad Association of St. Louis, a corporation, appellant, No. 38,934, on the docket of the

court below, affirming a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of respondent and against your petitioner herein.

Your petitioner further states that the Missouri Supreme Court en banc will not entertain a motion to transfer any cause from one division thereof to court en banc.

OPINION OF THE COURT BELOW.

The opinion of the court below in said cause of Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, vs. Terminal Railroad Association of St. Louis, a corporation, appellant, which is by this petition sought to be reviewed, appears on pages ... to ..., both inclusive, of the printed transcript of the record filed herein. Petitioner is unable at this time to include herein the citation of the opinion of the court below in said cause, either in the Southwestern Reporter or in the official volumes of the Missouri Reports, because said opinion has not yet appeared in either of those publications.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 334, providing for review in this Court by certiorari of decisions of the highest courts of the several states wherein a title, right, privilege or immunity especially set up is claimed under a statute of the United States. Authorities sustaining the jurisdiction are:

> Steeley v. Kurn et al., 313 U. S. 256, 61 S. Ct. 934;
> Brady v. Southern R. Co. (not yet published in the official U. S. Reports), 88 L. ed., Adv. Op. 189, 191.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act), 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, in her capacity as Administratrix of the Estate of John W. Hertz, to recover from petitioner damages for the death of her said intestate. John W. Hertz was killed on December 16, 1941, in the State of Illinois, when he was crushed between the edge of a loading dock belonging to the Federal Barge Line and a portion of a freight car which was being moved on a track immediately adjacent to the loading dock.

Respondent's petition alleges that while Hertz was in a position of imminent peril of being struck and injured by the movement of petitioner's train, petitioner was guilty of negligence in the following respects: (1) caused the train to be suddenly and unexpectedly backed with great force and violence; (2) that the locomotive was defective in that the engine, air hose, air brakes and brake pins were disconnected; (3) that petitioner's agents and servants permitted said train of cars to be driven backward with great force and violence, knowing that the air brakes were inadequate and insufficient to hold the train; (4) that petitioner's servants caused and permitted the air brakes on its train to be released, thereby causing and permitting said train to move backward with unusual speed; (5) that the car which crushed Hertz between the edge of the loading platform and the side of the car was of unusual width, whereas the space between the side of the car and the loading platform was insufficient for Hertz to pass, nevertheless, petitioner's servants caused and permitted the train to be driven backward with great force and violence; (6) petitioner's servants left decedent in charge of an inexperienced and incompetent apprentice switchman, and decedent's foreman placed himself in a

position where he could neither hear nor observe signals given by decedent, and while decedent was in such place of imminent peril, his foreman signaled the engineer to release the air brakes and back the train.

Petitioner answered by admitting that decedent was killed at the time and place mentioned in respondent's petition, that he was at that time engaged in interstate transportation, and denied every other allegation of respondent's petition. Petitioner further pleaded that decedent had assumed the risk or danger of standing at the point where he was standing when injured, because the danger was open and obvious and well known to him.

Decedent and his switching crew were engaged in placing certain cars on a dock belonging to the Federal Barge Line on the eastern bank of the Mississippi River opposite St. Louis, Missouri. Petitioner's switch track ran down to the edge of the water and thence over a cradle to a barge lying along the east side of a loading dock of the Federal Barge Line. It was the duty of decedent's switching crew to place empty cars alongside the dock so that they could be loaded from the dock. The switch track leading south from petitioner's switch yard down to the river bank declines very sharply to the river bank. Beyond the river's edge there is an incline up to the barge, and beyond the north end of the barge the track is for all practical purposes level. The cradle over which the cars pass from the river's edge to the north end of the barge is not sufficiently strong to permit the passage of a locomotive over it (R. 76). Consequently, it is necessary to have attached to the locomotive cars in addition to those which are to be left on the barge at the appointed places.

There are five particular spots called positions on this barge at which cars are regularly spotted for loading purposes. The position called No. 1 is farthest south and the position called No. 5 farthest north. On the occasion in question four cars were to be spotted at positions Nos. 2 to 5, both inclusive (R. 21).

During the switching operation and after the cars had reached the point where they were to be left, it was necessary to uncouple the fourth from the fifth car from the south end. In the meantime, however, a stop had been made not quite at the proper position. Consequently, the switch foreman gave a signal which was passed to the engineer to pull the cars toward the north, which stretched out the slack in the train (R. 37). About that time the dock foreman indicated that it would be satisfactory to leave the cars as they were, whereupon the switch foreman gave a stop signal and the forward movement of the cars was stopped (R. 37).

Decedent had been in petitioner's employ about five years (R. 66), had been working with that particular crew which spotted cars on this barge for more than a year (R. 35), and during that year had helped spot cars on this barge practically every night (R. 36).

At the time the string of cars was stopped and the point had been reached when it was necessary to uncouple them, decedent who had been walking along on the loading dock came up to the point where the cars were to be uncoupled, got down off the loading dock, went between the ends of the fourth and fifth cars from the south end, reached over and shut the angle cocks on both of them, and disconnected the air hose between the two cars (R. 23). It was necessary to disconnect this air hose in order to permit the air brakes to operate on the remainder of the cars and to set the brakes on the four cars (R. 23). After decedent had disconnected the air hose between the two cars, he reopened the angle cock on the north end of the fourth car which was to be left on the track, for the purpose of draining the air from the reservoirs on the four cars and setting the brakes on all four of them (R. 23). He permitted the angle cock on the south end of the fifth car, which was to remain a part of the train, to remain closed in order to permit the air brakes between

that point and the locomotive to continue operating (R. 23). As a consequence of reopening the angle cock at the north end of the last car which was to remain on the barge, the air brakes on that and the three cars south of it were fully set, thus preventing the movement of the four cars to any appreciable extent (R. 38).

After decedent had properly set the angle cocks on the cars and had uncoupled the air hose, the switch foreman, Daly, who was on top of the first car north of where the uncoupling was to be made, walked from the south end to the middle of the car (R. 24), so that when the movement came he could not possibly be thrown over the end of the car (R. 24, 32). After the switch foreman had reached the middle of the car he could no longer see decedent who was down on the track (R. 24); consequently, decedent had to inform Daly by word of mouth when he desired the slack to be given him in order to permit him to uncouple the cars, as the switch foreman could not see a lantern signal by decedent (R. 31). In due time, decedent shouted to his foreman a request to give him the slack (R. 30, 104). Thereupon the switch foreman passed the signal to the head brakeman who was standing on top of the third car from the locomotive (R. 96). The head brakeman then passed the signal to the engineer (R. 27).

The slack could not be given immediately for the reason that after the signal for slack is given to the engineer, from three to five minutes are required for the air pump on the locomotive to increase the air pressure to a sufficient extent that the brakes may be released and the slack given (R. 31, 32). In due time the slack which had been called for by decedent was given, and it was during that slack movement that he was killed.

There was but one eye-witness to this fatality, a student brakeman whom decedent and the other members of his crew were teaching. This student brakeman was working

primarily with decedent who was showing him how to become a switchman (R. 99). He was standing on the loading dock just above decedent at the time the latter was killed, and saw him get caught between the car and the loading dock (R. 99). The student brakeman, whose testimony was not impeached or in any way contradicted, and could not be because he was the sole eye-witness, testified that decedent was caught "just as soon as the movement started" (R. 100); "he got caught immediately" (R. 105). When the movement was stopped, decedent was caught between the loading dock and the ladder on the south end of the side of the fifth car (R. 100).

The space between the side of a car and the edge of the loading dock was four to six inches (R. 19), and between the ladder on the side of a car and the edge of the loading dock was approximately three or four inches (R. 29). The ladder on the side of the car was about three or four inches from the south end of the car where decedent was (R. 29).

The switch foreman testified that at the time the slack movement occurred, that portion of the train which was coupled to the locomotive moved from a foot to a foot and a half (R. 28). The student brakeman thought that the cars moved between two and four feet (R. 99, 105). The head brakeman testified that the car he was on (third from the locomotive) moved not over four or five inches (R. 96). The locomotive scarcely moved, not over six or eight inches (R. 80). On the other hand, the dock foreman testified that the four cars to be left at the loading dock moved "at least twelve feet" (R. 51); "probably the best of my thought is twelve feet" (R. 56); but he did not know how far the car which killed decedent moved (R. 56).

When the movement had been stopped, decedent's body was found to be caught between the platform of the dock and the ladder on the west side and near the south end of

the last car which was coupled to the locomotive (R. 29, 52). Decedent's neck was just about in the middle of the ladder and one of the rungs of the ladder "was bent in towards the side of the car" (R. 64).

There were two tracks on this barge, the west track where decedent was standing, and the east track (R. 36). On all occasions except this one, respondent and all other switchmen had switched the west track while standing on the east side of it or while standing on the west side of the east track (R. 35, 36, 39). On this occasion decedent stood on the west side of the west track, although the east track was clear of cars at that time (R. 38), and nothing prevented decedent from working from the east side of the west track, as everyone had done prior to this time, and where he could have uncoupled the cars with perfect safety (R. 38).

Although the switch foreman had seen decedent standing between the cars and immediately adjacent to the loading platform, just prior to the time decedent gave the signal for the slack movement, the switch foreman had no idea that decedent would remain in that position, but supposed that he would move over to the east side of the track where he could make the uncoupling in perfect safety (R. 36).

Decedent, as a member of this particular crew for more than a year (R. 35), had made this same switching movement for the purpose of "spotting" cars on this barge practically every night during that year (R. 36), and at no time theretofore had stood anywhere but on the opposite side of the track from where he was killed (R. 36). Prior to the occasion of decedent's death, all switchmen who did this kind of work and switched cars on this barge worked from the east side of the track instead of the west side of the track where decedent was at the time of his fatal injury (R. 36, 59, 98).

Respondent submitted her case to the jury upon the hypothesis that petitioner's negligence consisted in making this slack movement "with unnecessary and unusual force and speed" (R. 110).

QUESTIONS PRESENTED.

I.

Did decedent voluntarily and knowingly assume a position of imminent danger when he stood between the ends of the two freight cars where the uncoupling operation was to be done, and then signal for a sufficient movement of the train to give him the necessary slack to make the uncoupling operation possible, when he could have avoided all danger by standing on the opposite side of the track where he and all other switchmen prior to that occasion had stood to uncouple cars?

The court below stated in its opinion that "the jury could draw the inference that there was no certain danger of extreme peril, nor even negligence, in the manner in which Hertz was proceeding to lift the pin."

II.

If decedent chose a position of imminent and certain peril rather than one of safety and then signaled for the movement of the train to give him the slack which would enable him to uncouple the cars, were his own actions in so doing the sole proximate cause of his death?

III.

If the evidence showing that the proximate cause of decedent's death was his own negligence solely, comes from witnesses whose testimony is uncontradicted, unimpeached, not inherently unbelievable and not contrary to physical facts, must the trial court and the court below accept such facts as true?

Both the trial court and the court below refused so to accept such testimony.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The track upon which decedent was killed was immediately adjacent to a loading dock platform. Just to the east of this track was another railroad track which, at the time of decedent's death, was open and wholly unoccupied by any cars (R. 38). Prior to the date of Hertz' death, neither he (R. 36) nor any other switchman had ever attempted to uncouple cars while standing on the west side of the track adjacent to the loading dock platform; everyone had used the opposite side of the track or stood upon the track immediately east of the track upon which decedent was standing (R. 36, 59). Decedent had been a member of this particular switching crew for more than a year (R. 35) and had made this same switching movement practically every night (R. 36). The conclusion is inescapable, therefore, that decedent knowingly and deliberately chose to attempt to uncouple these cars from the dangerous rather than the safe side of the track.

The court below holds that the evidence in this record did not establish any negligence whatever on the part of decedent, and did not establish that he was in a position of peril when killed.

Not only do the facts in this case conclusively show that decedent assumed a position of peril, by the very fact that he was killed while in such a position, but Congress long ago recognized that the necessity of one's going between the ends of cars to couple or uncouple them compelled one to assume a position of extreme peril. For that reason it passed the Safety Appliance Act, 45 U. S. C. A., Sec. 2, 27 Stat. 531, providing that it should be unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any cars used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which

can be uncoupled without the necessity of men going between the ends of the cars." Moreover, in her petition respondent pleaded in every negligence-charging paragraph save one, that decedent was in a position of imminent peril.

II.

The sole proximate cause of Hertz's death was his own deliberate choice of a highly dangerous rather than a perfectly safe place, for uncoupling the cars; and then remaining there and giving the signal for the slack movement.

There is the evidence of but one witness in this case that the four southernmost cars moved a distance of twelve feet towards the south as a result of the slack movement (R. 50, 51). He did not know how far the cars which remained attached to the engine moved or whether the uncoupling was made (R. 56). We must therefore go to the testimony of petitioner's witnesses to ascertain how far the car moved which caught and killed decedent. That testimony shows a movement of that car from a foot to four feet (R. 43, 99, 106).

There was but a single eye-witness to decedent's death. He was on the dock platform directly above decedent when the latter was killed (R. 99). This witness testified that decedent was caught "just as soon as the movement started" (R. 100); that "he got caught immediately" (R. 105); that decedent was not rolled "any twelve feet away" from the witness but only two, three or four feet (R. 107).

Even though it should be assumed that the four southernmost cars were moved a distance of twelve feet as a result of the slack movement, and that the fifth car remained coupled to the remainder of the train, and that it, also, moved a distance of twelve feet, nevertheless because decedent was caught within the first few inches of that

movement, the distance moved by any of the cars thereafter could in no way affect the question of proximate cause. Decedent was killed within the first few inches of the slack movement; and there is no testimony in this record showing that a slack movement of that distance is in any way negligent. Therefore, there is no showing of any negligence on the part of petitioner in the execution of this slack movement. As a result, the proximate cause of decedent's death must have been his own negligence in voluntarily, knowingly and for the first time, choosing a highly perilous rather than a perfectly safe position.

III.

The evidence in support of the first two reasons relied upon for the allowance of the writ herein sought, is uncontradicted, undisputed, unimpeached in any way, not contrary to physical law, and not inherently incredible. Under the decisions of this Court neither the trial court, the jury therein, nor the court below can arbitrarily refuse to give credence to such evidence. The court below did so refuse, and affirmed respondent's verdict herein, contrary to this Court's rulings.

Moreover, if for argument's sake a contradiction should be admitted with respect to the distance the four southernmost cars moved, the evidence on behalf of petitioner is so overwhelming as to preclude the possibility of reasonable minds differing upon its effect, and of accepting the theory of respondent approved by the court below, without disregarding the governing principles announced by this Court.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that court to certify to this Court on a day certain to be named therein, a full and complete tran-

script of the record of the proceedings in said cause of Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, respondent, vs. Terminal Railroad Association of St. Louis, a corporation, appellant, that court's number 38,934, to the end that said judgment of said court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated October 9, 1944, when its motion for rehearing or in the alternative to transfer said cause from Division One of said court to court en banc was overruled, shall be reversed; and that petitioner shall have such relief as to this Court shall seem appropriate.

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